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No. 80-1190

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PULLMAN-STANDARD, a Division of PULLMAN, INCORPORATED,
Petitioner,

v.

LOUIS SWINT and WILLIE JOHNSON,
Respondents.

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The reply brief for petitioners (Steelworkers) in the companion case, No. 80-1193, impressively demonstrates the Fifth Circuit's failure in this litigation to apply the "clearly erroneous" standard required by Federal Rule of Civil Procedure 52(a) in its wholesale rewriting of the trial court's findings of fact. One hopes that the true, really relevant facts, as found by the trial court and as substantially restated in our petition herein and that in No. 80-1193 may thereby escape the memory hole[1] to which the Fifth Circuit's latest opinion in effect consigns them.

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[1] George Orwell, "1984" (1949 Ed., pp. 38-42)

We became aware of the Court's conference schedule applicable to these companion petitions only upon receipt of the Steelworkers' reply brief, and as we now understand, both petitions will be taken up at the Court's April 17 conference. In order to permit the consideration of this reply brief at this conference, this reply brief is being submitted in typewritten form. It will be resubmitted in printed form as soon as possible.

Respondent's brief in opposition (p. 7, n.8) makes the comment, "The company does not even assert that the case presents a conflict of decisions." While our petition is primarily addressed to the conflict of the Fifth Circuit's decision with *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977), as demonstrated in the Steelworkers' petition, it is certainly true, that there is a conflict among the circuits "on the issue whether a court of appeals may 'independently determine' the existence of discriminatory purpose free from the requirements of Rule 52(a)". Both petitions should be granted in order that his conflict be resolved. The purpose of this reply brief is to point out a further serious conflict among the circuits, namely as to the defense or principle of "business necessity", which is vividly shown by a comparison of the Fifth Circuit's decision in this case, with that of the Sixth Circuit in *Chrisner* v. *Complete Auto Transit, Inc.,* ____ F.2d ____, 25 FEP Cases 484 (March 19, 1981). The subject was dealt with on pages 6-7 and 28-30, particularly footnote 29, of our petition, but until the *Chrisner* case was decided the conflict among the circuits was not so manifest. We would like the Court to consider this conflict as an additional ground for granting our petition.

"Business necessity" crops up repeatedly in the Fifth Circuit's two opinions in relation to each substantive matter considered, viz. analysis of work force and labor market statistics (A-57, A-66) as bearing on seniority system *bona fides,* assignment of new hires to departments (A-69), and promotions to foreman (A-81-82; A-173-175); its 1976 decision said that welding and maintenance skills were not to be considered in

work force statistical analysis unless there was a certain "kind of business necessity finding" (A-57); literacy was not to be considered in analyzing foreman statistics unless Pullman adopted a minimum educational requirement and either "validated" it statiscally or proved it was a "business necessity" (A-81-82). The proceedings after remand to the District Court were hamstrung by these peculiar restrictions in the Fifth Circuit's mandate (e.g., see A-121, n.13) particularly as other of its holdings had defined "business necessity" as meaning absolutely essential or indispensable to safety and efficiency. Nevertheless, the District Court did find departmental incumbency was a business necessity[2] for purposes of its statistical analysis of temporary foreman promotions (A-113), but in its 1980 decision (A-153) the Fifth Circuit reversed this finding, treating departmental incumbency as if it were a restriction imposed by Pullman on temporary foreman vacancies; it said the "business need" for this was not "sufficiently compelling" and that to constitute "business necessity" it must "not only foster safety and efficiency, but must be essential to that goal ... and there must not be an acceptable alternative that will accomplish that goal 'equally well with a lesser differential racial impact.' " (A-175). This was coupled with the Fifth Circuit's 1976 holding (A-57) that "The question of absence of qualifications is relevant, but only *after* the determination that a pattern of discrimination has been shown; and then, the burden is on the defendant to show absence of qualifications." And (A-69) that relative lack of qualifications is statistically immaterial, for failure to fill vacancies with blacks "would only be justified if the defendant [sic] could show ... they lacked minimum qualifications and if such qualifications were justified by a business necessity."

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[2] It would have been better semantics to have said "it was a factor implying better qualification, other things being equal, but the District Court was constrained by the mandate of the Fifth Circuit (A-57) to use the terminology, "business necessity".

Now the Sixth Circuit has taken a dramatically opposed position as to business necessity and most of these related matters. The Sixth Circuit's position is the one we adovcated on pp. 29-30 of our petition, and we believe it is implicit logically in this Court's Title VII decisions. *Chrisner* v. *Complete Auto Transit, Inc.*, ____ F.2d ____, 25 FEP Cases 484 (6th Cir., March 19, 1981).

> "Literally construed, it would not be unreasonable to conclude that proof of a 'business necessity' defense requires a showing that the practice is absolutely necessary or inherently essential to the operation of the business.' Such a standard, however, would direct unwarranted strict scrutiny at the defendant's asserted justifications and has not been adopted by the Supreme Court. The proper test, as we see it, is the 'manifest relationship' test enunciated in *Griggs* [401 U.S. 424 (1971)] and its progeny which looks to whether the discriminatory employment practice is necessary to safe and efficient job performance. *Dothard*, [433 U.S. 321] at 332 n.14. For a practice to be 'necessary' however, it need not be the *sine qua non* of job performance; indispensability is not the touchstone. Rather the practice must substantially promote the proficient operation of the business.
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> * * *
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> "' For example, in requiring that there exist more than a business purpose for adhering to a practice, courts have demanded the presence of an overriding and compelling business purpose. *Kirby* v. *Colony Furn. Co.*, 613 F.2d 696 (8th Cir. 1980) ('The proper standard is ... whether there is a *compelling* need for the employer to maintain that practice and whether the employer can prove that is *no* alternative to the challenged practice.'); *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1389 (5th Cir. 1978).

Head v. *Timken Rollerbearing Co.*, 486 F.2d 870, 879 (6th Cir. 1973). *Campbell* v. *Ramsey*, 484 F.Supp. 190, 194 (E.D. Ark. 1980). The genesis of this approach appears to be *Robinson* v. *Lorillard Co.*, 444 F.2d 791, 798 (4th Cir.,), *cert. denied* 404 U.S. 1006 (1971).

"The dissent argues that the force of *Sweeney, supra,* necessitates a remand because the district court did not make the requisite findings on the business necessity defense when it condensed the Title VII analysis into two step. Nevertheless, it proceeds to assert that under *Head* v. *Timken Roller Bearing, supra,* the employer has not established a business necessity defense because the company subsequently used alternative selection devices. The dissent concedes the flaw in its analysis by ignoring the full force of *Sweeney*. Decided by the Supreme Court five years after *Head, Sweeney* stands for the proposition that the three-part Title VII analysis cannot properly be conducted in only two stages. The dissent's approach, which compels an employer to prove a business necessity defense by showing that there exist no less discriminatory alternatives, is, in essence, a two-stage analysis since it renders the third step superfluous. If an employer does prove a business necessity defense, that is, there are no alternative policies with a lesser discriminatory impact, a plaintiff would thereby be precluded from attempting to show that there are available alternatives — the crucial third stage of Title VII analysis. *Griggs* does not countenance denying a plaintiff the opportunity to rebut a business necessity defense under any circumstances, but that is precisely the result invited by the dissent's approach. An equally unsatisfactory result accrues when the other possibility is considered. If an employer does not prove the

absence of alternative policies, that would be the equivalent of affirmatively establishing that there are, in fact, viable alternatives. The burden of establishing the presence of available alternatives, however, belongs only to the plaintiff and must be sustained in the third stage of the analysis. Such an erroneous allocation of the burden of proof is exactly the practice rejected by *Sweeney*.

"This illustrates the dilemma the dissent puts itself in by arguing that a remand is necessary under *Sweeney* because the trial court collapsed the three step inquiry into two steps, and at the same time relying on *Head* v. *Timken Roller Bearing* which commands a two-step analysis. The dissent omits the full language of *Head*, which reads:

> "The court's error arose from its failure to take into account one necessary element of the test. *The test consists of two discrete parts* as set forth in *Robinson* v. *Lorillard Co.*, 444 F.2d at 798:
>
> "The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and *there must be available no acceptable alternative policies or practices* which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact. (Emphasis in text.)

"Insofar as any two-part test is inconsistent with the three-part analysis outlined in *Griggs* and *McDonnell Douglas* and reinforced by *Sweeney*, it must be discarded.

"The dissent's insistence that *Head* has been 'consistently followed' cannot withstand the scrutiny of closer analysis. In *Horace* v. *City of Pontiac, supra*, this court did not cite *Head*, but rather quoted the three part test of *Griggs* and *McDonnell Douglas*. The only reference to *Head* appears in a block quote of the district court's opinion. 624 F.2d at 768. In *Mitchell* v. *Mid-Continent Spring Co.*, 583 F.2d 275 (6th Cir. 1978), *Head* was cited only for the proposition that females must have equal employment opportunities. 583 F.2d 281. In *EEOC* v. *New York Times Broadcasting Service, Inc.*, 542 F.2d 356 (6th Cir. 1976), *Head's* two-step process was, in fact, followed. 542 F.2d at 361. That was not true, however, in *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), where the court relied on *Head* solely for the principle that when a seniority system lock a minority of black employees into low opportunity areas of work, while protecting the status of those of the majority, it must give way. 515 F.2d at 313. And in *Palmer* v. *General Mills, Inc.*, 513 F.2d 1040 (6th Cir. 1965), the court divided *Head's* second step into three subparts, holding that the essential finding was that the seniority practice at issue was not of compelling importance to the company's business, that whether the practice effectively carried out a business purpose was irrelevant because the challenge was directed at a facially neutral policy, and that the availability of alternatives was pertinent only to the remedy, not to liability. 513 F.2d at 1044. This 'long line of subsequent decisions' hardly constitutes a litany of faithful adherence to *Head* as suggested by the dissent. [Footnote in the original.]

"Complete Auto argues that its experience/schooling criteria were reasonable minimum requires to insure that yard employees were qualified to operate tractor trailers on the public highways in a safe and efficient manner. The yard employees are called upon to drive tractor-trailers to the overflow lot over the public highways. The performance of this task in a satisfactory manner requires a certain degree of skill in operating the tractor-trailers. The company's goal of transporting its freight in a safe and efficient manner is significantly served by hiring experienced truck operators. An individual who possesses experience in driving large, unwieldy vehicles is obviously a more rational choice for the job than is a person who does not have demonstrated ability to drive such vehicles. In this respect, the experience requirement accurately reflects the capacity of an applicant to do the job for which he is applying. Three is some risk to the public safety, as well as to the driver and truck, in the employment of an unqualified yard employee. The important public interest in safety on the roads and highways, *see Mackey* v. *Montrym*, 443 U.S. 1, 18 (1979); *Dickson* v. *Love*, 431 U.S. 105, 114 (1977), is sufficiently weighty to convince us that Complete Auto's experience requirement for yard employees is manifestly related to the safe and efficient operation of its business of transporting automobiles over the public highways.

> "Once the defendant in a Title VII disparate impact case has rebutted the plaintiff's prima facie case by proving a business necessity defense to to the challenged practice, the burden shifts back to the plaintiff. To establish liability at this point, the plaintiff must demonstrate that there is an alternative selection device with a disparate impact less than that of the challenged practice which would still serve the employer's legitimate interests in efficiency and trustworthy workmanship. *Griggs, supra,* at 432;

> *Albermarle, supra,* at 425. Because the district court failed to consider this as a separate stage in the analytical framework of the case, we remand the case for the court to conduct a hearing on this issue. In determining whether the plaintiff has sustained her burden in proving the existence of a viable alternative hiring procedure, the court should consider evidence that the plaintff might introduce on a variety of factors. Certainly any subsequent practices adopted by the company would be relevant. The hiring policies of comparable businesses might also shed some light on what constitutes a feasible alternative. Of course, the marginal cost of another hiring policy and its implications for public safety are factors which should not be omitted from consideration. In any event, the initial determination must rest with the trial court."

It is manifest that application of the Sixth Circuit's rule to the facts of this case would necessitate an entirely different result. Statistical analysis of hiring of machinists and millwrights would require comparison of numbers hired with numbers of experienced or trained machinists and millwrights in the labor market. The trier of fact could certainly conclude that literacy of foremen promotes efficiency even if it is not absolutely indispensable in every case. Statistical analysis of foreman promotion would obviously have to be vastly changed on the evidence in this case, from that which the Fifth Circuit made, based on its erroneous view of business necessity.

See also analysis of the *Chrisner* case in BNA Labor Relations Reporter, 106 Analysis 53 (April 6, 1981), wherein it is said, "This case illustrates the confusion that surrounds the business necessity defense. ..."

The writ should be granted to resolve this confusion and the conflict among the Circuits in this regard.

Respectfully submitted,

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